Wong Huat Construction Co v Ireka Engineering & Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C-141–11 OF 2016
LEE SWEE SENG J
30 MAY 2017

Building and Construction Law — Dispute resolution — Adjudication — Application to set aside decision of adjudicator — Claimant engaged to perform subcontract works — Dispute over payment claims on works done — Adjudicator awarded claimant lesser sum than claimed for — Whether claimant 'aggrieved person' — Whether claimant had locus to apply to set aside adjudication decision — Whether adjudicator acted in excess of jurisdiction by deciding on lesser sum admitted by non-paying party — Construction Industry Payment And Adjudication Act 2012 ss 5, 12 & 15

The defendant appointed the plaintiff as the subcontractor for painting works for a proposed hotel development ('the works') with a consideration of RM1,019570.40. Pursuant to variation orders and/or site instructions issued by the defendant, the plaintiff also performed additional works amounting to RM169,349.17 ('the additional works'). The plaintiff completed the works and additional works and the defendant accepted them without any objections. The plaintiff then issued progress claims for the works amounting to RM1,137,653.75. However, the defendant only made a total payment of RM906,376.58 ('the paid sum') and released RM23,066.59 being part of the retention sum. To the plaintiff, the partial release of the retention sum meant that the employer for the project had accepted full completion of the works and that would leave an outstanding amount of RM231,277.17 ('the outstanding sum') due and payable to the plaintiff. In an adjudication against the defendant, the plaintiff served a payment claim to the latter, pursuant to s 5 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to claim for the outstanding sum. The defendant filed a cross-claim for overpayment but this was later abandoned and the defendant argued that the final contract sum payable to the plaintiff was only the paid sum. The plaintiff disputed the defendant's unilateral re-measurement and applied for an order of discovery of documents issued by the consultants in the main project. While the discovery application was still pending, the adjudicator informed the parties to cease all communications with the adjudicator as the decision would be delivered soon. As the contract between the parties stated that the final quantities shall be based on measurement of the actual work done, the adjudicator adjudged a sum of RM29,791.73 ('the awarded sum') in the plaintiff's favour ('the adjudication decision'). The defendant complied with

the adjudication decision and paid the awarded sum via cheque but the same was rejected by the plaintiff. In the present claim, the plaintiff sought to set aside the adjudication decision on the grounds of: (a) denial of natural justice; and (b) that the adjudicator had acted in excess of his jurisdiction ('encl 1'). Meanwhile, the defendant applied to strike out encl 1, arguing that it was scandalous, frivolous, vexatious and an abuse of the court process ('encl 7'). The issues that arose were: (i) whether the plaintiff, having received a very much smaller sum in his favour than what was claimed for, was an 'aggrieved person' with the locus to apply to set aside the adjudication decision; (ii) whether there was a denial of natural justice when the adjudicator appeared not to have decided on the plaintiff's application for discovery; and (iii) whether the adjudicator acted in excess of his jurisdiction when he decided on a lesser sum admitted by the defendant as the non-paying party when the defendant had earlier cross-claimed for overpayment.

Held, dismissing encls 1 and 7:

(1) An 'aggrieved person' within the meaning of s 15 of the CIPAA includes a person against whom an adjudication decision is made. An 'aggrieved person' is not confined to a person against whom an adjudication decision is made. It might well include a person who received an adjudication decision in his favour but who is aggrieved as in he should have received more if, for instance, there has not been a denial of natural justice. There was no good reason why the plaintiff could not be said to be an 'aggrieved party' in that it had been awarded a lesser sum compared to a bigger sum, had jurisdiction been rightly exercised (see paras 24 & 54).

(2) There was no breach of natural justice. Natural justice requires that the parties should be heard; it does not require that they be given responses and determinations on all submissions made. Whilst it would be ideal to set out clearly his decision on the discovery application by the plaintiff, the adjudicator had accepted the reasons given by the defendant and that, in the rush to get out the decision on time, he could have missed out altogether this matter as in setting out his reasons for dismissing the formal discovery application. It must be borne in mind that an adjudicator has to deliver his decision within the strict time frame provided for in s 12(a) of the CIPAA which is within 45 working days from the service of the adjudication reply. Furthermore, the non-production of the documents did not, in any way, hamper the adjudicator from deciding on the dispute based on the documents and evidence before him. It was open to him to draw the necessary adverse inferences against the defendant if he was not satisfied with the reasons given by the defendant for the non-production of the documents (see paras 79–80, 89 & 97).

(3) There was nothing improper in abandoning a cross-claim. The defendant admitted to the awarded sum owing to the plaintiff. It was within the jurisdiction of the adjudicator to then ascertain what was the actual amount owing to the plaintiff by the defendant. The adjudicator had not transgressed outside the payment claim and the payment response because the adjudicator rightly understood his jurisdiction to determine the amount owing to the claimant for the works done (paras 105–106).

[Bahasa Malaysia summary

Defendan melantik plaintif sebagai subkontraktor bagi kerja-kerja mengecat untuk pembangunan hotel yang dicadangkan ('kerja-kerja') dengan balasan sebanyak RM1,019570.40. Ekoran perintah variasi dan/atau arahan tapak yang dikeluarkan oleh defendan, plaintif juga menjalankan kerja-kerja tambahan yang terjumlah kepada RM169,349.17 ('kerja-kerja tambahan'). Plaintif menyempurnakan kerja-kerja dan kerja-kerja tambahan dan defendan menerimanya tanpa apa-apa bantahan. Plaintif kemudian mengeluarkan tuntutan-tuntutan berperingkat bagi kerja-kerja yang berjumlah RM1,137,653.75. Walau bagaimanapun, defendan hanya membayar jumlah bayaran sebanyak RM906,376.58 ('jumlah yang dibayar') dan melepaskan RM23,066.59 iaitu sebahagian jumlah tahanan. Pada plaintif, pelepasan sebahagian jumlah tahanan bermaksud majikan projek telah menerim bayaran penuh kerja-kerja dan ini meninggalkan baki berjumlah RM231,277.17 ('jumlah terhutang') yang terhutang dan perlu dibayarkepada plaintif. Dalam adjudikasi terhadap defendan, plaintif menyerahkan tuntutan bayaran kepada defendan di bawah s 5 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta') untuk menuntut jumlah yang terhutang. Defendan memfailkan tuntutan balas bagi bayaran lebihan tetapi ini kemudian diabaikan dan defendan menghujahkan bahawa jumlah akhir kontrak yang harus dibayar kepada plaintif hanyalah jumlah yang dibayar. Plaintif mempertikaikan pengiraan semula sebelah pihak oleh defendan dan memohon perintah penzahiran dokumen yang dikeluarkan oleh perunding-perunding dalam projek utama. Sementara permohonan penzahiran masih berjalan, adjudikator memaklumkan pihak-pihak untuk menamatkan komunikasi dengan adjudikator kerana keputusan bakal disampaikan. Oleh kerana kontrak antara pihak-pihak menyatakan bahawa kuantiti akhir hendaklah berdasarkan pengiraan kerja-kerja yang sebenarnya dijalankan, adjudikator memberi jumlah RM28,791 ('jumlah yang diawardkan') berpihak pada plaintif ('keputusan adjudikator'). Defendan mematuhi keputusan adjudikator tersebut dan membayar jumlah yang diawardkan melalui cek tetapi ini ditolak oleh plaintif. Dalam tuntutan ini, plaintif memohon untuk mengetepikan keputusan adjudikasi atas alasan: (a) penafian keadilan asasi; dan (b) adjudikator bertindak melebihi bidang kuasanya ('lampiran 1'). Defendan pula memohon untuk membatalkan lampiran 1 dengan hujahan ianya remeh, menyusahkan dan satu salah guna proses mahkamah ('lampiran 7'). Isu-isu yang timbul adalah: (i) sama ada plaintif, setelah menerima jumlah yang amat

kecil berpihak padanya berbanding apa yang dituntut, adalah 'aggrieved person' dengan locus untuk memohon mengetepikan keputusan adjudikasi; (ii) sama ada terdapat penafian keadilan asasi apabila adjudikator kelihan memutuskan tentang permohonan penzahiran plaintif; dan (iii) sama ada adjudikator bertindak melebihi bidang kuasanya apabila beliau memutuskan bagi jumlah yang kurang daripada yang diperakui oleh defendan sebagai pihak yang tidak membayar sedangkan defendan terdahulu telah menuntut balas bagi bayaran lebihan.

Diputuskan, menolak lampiran 1 dan 7:

(1) Seorang 'aggrieved person' dalam maksud s 15 Akta termasuk seseorang yang terhadapnya keputusan adjudikasi dibuat. Seorang 'aggrieved person' tidak terbatas pada orang yang terhadapnya keputusan adjudikasi dibuat. Ini melibatkan orang yang menerima keputusan adjudikasi berpihak padanya tetapi terjejas kerana dia sepatutnya mendapat lebih jika, contohnya, tiada penafian keadilan asasi. Tiada sebab yang baik kenapa plaintif tidak boleh dikatakan 'aggrieved person' kerana diawardkan jumlah yang kurang berbanding yang lebih besar sekiranya bidang kuasa dijalankan dengan betul (lihat perenggan 24 & 54).

(2) Tiada pelanggaran keadilan asasi. Keadilan asasi mengkehendaki semua pihak didengar; ia tidak mengkehendaki mereka diberi respon dan keputusan tentang semua hujahan yang dibuat. Walaupun ideal untuk menyatakan keputusannya dengan jelas tentang permohonan penzahiran oleh plaintif, adjudikator telah menerima sebab-sebab yang diberi oleh defendan dan bahawa, untuk mencapai keputusan dengan cepat dan tepat pada masanya, beliau ketinggalan perkara ini sama sekali iaitu menyatakan alasan-alasan beliau menolak permohonan formal penzahiran. Mesti diingat bahawa seorang adjudikator menyampaikan keputusan beliau dalam rangka masa ketat yang diperuntukkan dalam s 12(a) Akta iaitu dalam masa 45 hari dari penyampaian respon adjudikasi. Tambahan lagi, kegagalan mengemukakan dokumen tidak, dalam apa-apa cara, menghalang adjudikator daripada memutuskan tentang pertikaian berdasarkan dokumen dan keterangan di hadapan beliau terbuka buat beliau untuk membuat inferens bertentagan yang sepatutnya terhadap defendan jika beliau berpuas hati dengan alasan-alasan yang diberi oleh defendan tentang kegagalan mengemukakan dokumen-dokumen (lihat perenggan 79–80, 89 & 97).

(3) Tiada apa-apa yang tidak teratur dalam pengabaian tuntutan balas. Balasan bayaran menafikan jumlah yang terhutang pada plaintif. Defendan mengakui jumlah yang diawardkan yang terhutang pada plaintif. Ini dalam bidang kuasa adjudikator untuk memutuskan apakah jumlah yang sebenarnya terhutang pada plaintif oleh defendan. Adjudikator tidak tersasar keluar daripada tuntutan bayaran dan bayaran

balasan kerana beliau faham dengan baik bidang kuasa beliau untutk menentukan jumlah yang terhutang pada pihak yang menuntut bagi kerja-kerja yang dijalankan (lihat perenggan 105–106).]

Notes

For cases on adjudication, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4236–4239.

Cases referred to

AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd [2009] SGHC 260, HC (refd)

Ambank (M) Bhd v Pentadbir Tanah Gombak [2012] MLJU 1124; [2013] 10 CLJ 87, HC (refd)

Ayaaubkhan Noorkhan Pathan v State of Maharashtra and Others [2012] 8 MLJ 679; [2012] 8 Mad LJ 679, SC (refd)

Balfour Beatty Construction Ltd v Lambeth London Borough Council [2002] EWHC 597 (TCC), QBD (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Beumer Group UK Ltd v Vinci Construction UK Ltd [2016] EWHC 2283 (TCC), QBD (refd)

Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] MLJU 941; [2015] 8 CLJ 728, HC (refd)

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), QBD (refd)

Carillion Construction Ltd v Devonport Royal Dockyard [2005] EWHC 778, QBD (refd)

Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)

IEV International Pty Ltd v Sadacharamani a/l Govindasamy [2008] 2 MLJ 754, HC (refd)

Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor [2008] 4 MLJ 1, FC (refd)

National Union of Bank Employees v Director General of Trade Unions & Anor [2015] 1 MLJ 881, CA (refd)

Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2011] WASCA 217, SC (refd)

Quanta Industries Pte Ltd v Strategies Construction Pte Ltd [2015] 2 SLR 70, HC (refd)

Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873, HC (refd)

SEF Construction Pte Ltd v Skoy Connected Pte Ltd [2010] 1 SLR 733, HC (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)

Sidebotham, Re, ex p Sidebotham (1880) 14 Ch D 458, CA (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2016] 6 MLJ 717, CA (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd [2015] MLJU 695, HC (refd)
Westwood Structural Services Ltd v Blyth Wood Park Management Company Ltd [2008] EWHC 3138 (TCC), QBD (refd)
Working Environments Ltd v Greencoat Construction Ltd [2012] 142 ConLR 149, HC (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 48, CA (refd)
Yung Ing Ing v Hunfara Construction Sdn Bhd [2015] 5 MLJ 668, CA (refd)

Legislation referred to

Building and Construction Industry Security of Payment Act [SG] s 27(5)
Construction Contracts Act 2004 [AUS] s 46(1)
Construction Industry Payment and Adjudication Act 2012 ss 5, 6, 12(2)(a), (2)(c), 15, 15(b), (d), 25, 25(m), (n), 27(1), 30(1), (2)
Legal Profession Act 1976 s 103E
National Land Code s 428
Patents Act 1983
Rules of Court 2012 O 18 r 19(1)(b), (1)(d), O 33 r 3

Alliff Benjamin Suhaimi (Balan Nair with him) (Thomas Philip) for the plaintiff.
Paul Kwong (SY Lim with her) (Azman Davidson & Co) for the defendant.

Lee Swee Seng J:

[1] The plaintiff here is the claimant in the adjudication against the defendant. The claimant had obtained the adjudication decision in its favour but was not happy with the paltry sum of RM29,791.73 that was adjudged in his favour out of the sum of RM231,277.17 claimed for painting works done for the defendant who was the respondent in the adjudication.

PROJECT

[2] Pursuant to a bespoke domestic subcontract dated 12 September 2011 ('the contract'), the defendant appointed the plaintiff as the subcontractor for the supply and application of painting works for a proposed office and hotel development in Kuala Lumpur ('the works') for a consideration of RM1,019,570.40.

[3] According to the plaintiff, pursuant to variation orders and/or site instructions issued by the defendant, the plaintiff also performed additional works amounting to RM169,349.17 from September 2012 to August 2013 ('the additional works').

[4] The plaintiff said that he duly completed the works and the additional

works on or about 7 August 2013. According to him, the defendant duly accepted the said works without any objections and/or reservations. In this regard the plaintiff issued a total of eleven progress claim for the works amounting to RM1,137,653.75. These progress claims were issued between December 2011 to August 2013.

[5] The defendant had only made a total payment of RM906,376.58 including its debit notes. The defendant had also released RM23,066.59 on 5 February 2016 being a part of the retention sum.

[6] To the plaintiff, the partial release of the retention sum is taken to mean that the employer had accepted the full completion of the works. That would leave an outstanding amount of RM231,277.17 due and payable to the plaintiff for the completed works which have been accepted by the defendant.

[7] The main project was completed on 21 November 2012. This is reflected in the certificate of practical completion ('CPC') dated 15 December 2012 issued by Transmission Technology Sdn Bhd ('TTSB'), the employer for the project.

THE PROCEEDINGS IN ADJUDICATION

[8] On 21 March 2016, the plaintiff served a payment claim on the defendant pursuant to s 5 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to claim for the outstanding RM231,277.17.

[9] On 31 March 2016, the defendant served its payment response pursuant to s 6 of the CIPAA disputing the plaintiff's payment claim. The defendant further made a cross-claim of RM16,740.71. This was based on what the defendant said was an omission of RM249,547.62 to the original contract price and valuation for the additional works amounting to RM152,640.62 only.

[10] The defendant also issued its payment certificate No 11 dated 31 March 2016 together with the payment response to substantiate its cross-claim.

[11] After being served with the adjudication claim on 10 June 2016, the defendant served its this adjudication response dated 27 June 2016, in which they sought to include its payment certificate No 11 (revised) and its final certificate No 12 (both dated 23 June 2016).

[12] The defendant abandoned its cross-claim of over payment and conceded that the final contract sum payable to the plaintiff is only

RM936,167.81 which consists of RM770,022.78 for the works and RM166,145.03 for the additional works. Therefore, according to the defendant only RM29,791.73 is due and payable to the plaintiff.

[13] The plaintiff disputed the defendant's unilateral re-measurement and objected to the inclusion of the two payment certificates dated 23 June 2016. The plaintiff also took the position that the adjudication response contains matters that were never raised in the payment response.

[14] The plaintiff also reserved the right to apply for an order of discovery of documents issued by the consultants in the main project pursuant to cll 9.1 to 9.3, 17.1(a) and 18.2 of the contract. The plaintiff said that these documents are relevant to determine the dispute between the parties. The plaintiff subsequently applied to the adjudicator for an order for discovery pursuant to s 25 of the CIPAA.

[15] The adjudicator decided on 6 September 2016 that the contract between the parties stated that the final quantities shall be based on measurement of the actual work done. He adjudged a sum of RM29,791.73 in the claimant's favour out of the sum of RM231,277.17 claimed in the payment claim. He also ordered a sum of RM2,213.51 being the interest due to the delay in the release of the part first and whole of the second moiety retention sum to be paid by the defendant to the plaintiff. He further ordered that the defendant shall reimburse the plaintiff a sum of RM5,624.58 being the costs of adjudication.

[16] The defendant had complied with the adjudication decision by honouring the awarded sum in full through a cheque to the plaintiff on 22 September 2016. However, the plaintiff subsequently decided to waive its rights to payment under the adjudication decision by returning the same cheque to the defendant on 17 November 2016.

PRAYERS

[17] The claimant as plaintiff filed this application in encl 1 by way of this originating summons ('OS') to set aside the adjudication decision in its favour on grounds of denial of natural justice under s 15(b) and that the adjudicator had acted in excess of his jurisdiction under s 15(d) of the CIPAA.

[18] Meanwhile the defendant has filed an application by way of a notice of application in encl 7 to strike out the said OS on ground that it is scandalous, frivolous and vexatious and otherwise an abuse of the court process.

[19] The parties shall be referred to as the plaintiff and defendant and sometimes as the claimant and respondent respectively.

PRINCIPLES

[20] Section 15(b) and (d) provides as follows:

> 15 *Improperly Procured Adjudication Decision*
>
> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (b) *There has been a denial of natural justice*;
>
> ...
>
> (d) *The adjudicator has acted in excess of his jurisdiction*. (Emphasis added)

WHETHER THE CLAIMANT HAVING RECEIVED A VERY MUCH SMALLER SUM IN HIS FAVOUR THAN WHAT WAS CLAIMED IS NEVERTHELESS AN 'AGGRIEVED PERSON' WITH THE LOCUS TO APPLY TO SET ASIDE THE ADJUDICATION DECISION

[21] Who then is an 'aggrieved person' within the meaning of s 15 of the CIPAA who would have the locus to set aside an adjudication decision? It would certainly include a person against whom an adjudication decision is made. But should it be confined to a person against whom an adjudication decision is made? If it should be so confined then that expression should have been used in s 15 of the CIPAA because that expression is used in s 30(1) and (2) of the CIPAA as follows:

> 30 Direct Payment from Principal
>
> (1) If *a party against whom an adjudication decision was made* fails to make payment of the adjudicated amount, *the party who obtained the adjudication decision in his favour* may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.
>
> (2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on *the party against whom the adjudication decision was made* to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice. (Emphasis added.)

[22] It is a principle of interpretation of statutes that when different words are used in the same statute to express a particular matter, the legislature must have intended a different meaning; otherwise for clarity and consistency same words or expressions should be used.

[23] If authority is needed one can refer to the seminal work by *Bennion on Statutory Interpretation* as was so referred by the Court of Appeal in the case of *Yung Ing Ing v Hunfara Construction Sdn Bhd* [2015] 5 MLJ 668. Justice Mohd Hishamudin Yunus JCA applied this principle of interpretation when he observed as follows:

> [29] In my judgment it is a principle of interpretation of statutes that *where the Legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, it must be presumed that the Legislature acts intentionally and purposely in the disparate inclusion or exclusion.* There are the principles of construction as pointed out by *Bennion on Statutory Interpretation (LexisNexis (5th Ed)* at pp 1157 and 1160):
>
> > Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should be given a meaning, *the same word should be given the same meaning, and different words should be given different meanings*.
> >
> > Every word to be given meaning. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded.
> >
> > Different words to be given different meanings. Similarly it is presumed that *the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning* ... (Emphasis added.)

[24] One can say quite confidently that 'an aggrieved person' is not confined to a person against whom an adjudication decision is made. It may well include a person who has received an adjudication decision in his favour but who is aggrieved as in he should have received more if for instance there has not been a denial of natural justice. Here we are not talking about the merits of applying to set aside but merely the locus to set aside an adjudication decision. It would also apply to a person whose whole payment claim has been dismissed by the adjudicator.

[25] I appreciate in such an instance the claimant who is aggrieved would have to set aside the whole of the decision and not just a part of it unless the part affected is severable from the part not affected by the vitiating grounds under s 15 of the CIPAA.

[26] Generally, 'an aggrieved party' is the non-paying party in the adjudication who is normally the respondent who is required to pay the claimant an adjudicated sum. Here the respondent has no problem paying the said sum and in fact is not applying to set aside the adjudication decision. It is the claimant who has obtained an adjudication decision in its favour that is applying to set it aside.

[27] As the word 'aggrieved' is not defined, one would be permitted to apply the ordinary and natural meaning of the word. In the Court of Appeal's decision in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 at p 499 (CA) it was held as follows:

> *To my mind, the word 'aggrieved' must be given its ordinary meaning*. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. *An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body*. The category of aggrieved persons is never closed. (Emphasis added.)

[28] In *Sidebotham, Re, ex p Sidebotham* (1880) 14 Ch D 458, at p 465, it was held that:

> *A 'person aggrieved' must be a man who has suffered a legal grievance*, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something. (Emphasis added.)

[29] In *Black's Law Dictionary* (7th Ed) the word 'aggrieved party' is defined as:

> A party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment.

[30] Learned counsel for the plaintiff/claimant had listed down the reasons for stating that the claimant is 'an aggrieved party' in this case as follows:

(a) the plaintiff was denied the opportunity to fully prosecute and present its case when the adjudicator did not entertain and/or ignored the discovery application;

(b) the adjudicator proceeded to give the decision without the benefit of important and relevant documents which will finally determine the issue of actual quantities of the works;

(c) the adjudicator had determined that the documents requested are relevant to the dispute when he directed the clarification exercise and when he made the discovery order;

(d) the adjudicator fully accepted the defendant's final two payment certificates despite the plaintiff's position that the said certificates were issued in bad faith and merely as an afterthought to defeat the plaintiff's adjudication claim;

(e) the adjudicator did not give any reason for accepting the figures contained in the said payment certificates despite the plaintiff's objection to the same;

(f) the adjudicator failed to give any reason and/or address the plaintiff's position that that the said certificates were issued in bad faith and as an afterthought;

(g) the adjudicator did not issue any fresh directions and/or make any finding against the defendant despite the defendant's continuous failure to comply with the clarification exercise and the discovery order;

(h) however, the adjudicator appeared to have punished the plaintiff for its non-competence to participate in the joint re-measurement exercise when he directed for parties to cease all communications and he will deliver his decision in light of the fact that the re-measurement exercise could not be carried out;

(i) based on paras 7–8 above, the adjudicator appeared to have given undue preference to the joint re- measurement exercise though the clarification exercise was supposed to be carried out simultaneously;

(j) the adjudicator's acceptance of the defendant's final two certificates to be the actual quantities of the works is not in accordance with the standard industry practice. this is especially when the actual quantities can be conclusively determined from the documents; and

(k) the others matters as elaborated in this submission, including the adjudicator's acceptance of matters and documents which were not part of the payment response.

[31] As stated, at this stage we are not concerned with the validity or viability of the grounds to set aside the adjudication decision by a claimant who has obtained a decision in his favour but merely whether that party has the locus to apply to set aside the adjudication decision.

[32] It would be helpful to look at other jurisdictions that has a similar scheme of statutory adjudication to see who may apply to set aside an adjudication decision and the actual words used to describe such a party.

[33] In Singapore, s 27(5) of the Building and Construction Industry Security of Payment Act (Chapter 30B) provides that:

> *Enforcement of adjudication determination as judgment debt, etc.*
>
> (5) Where *any party to an adjudication commences proceedings to set aside the adjudication determination* or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap 322, R 5), pending the final determination of those proceedings. (Emphasis added.)

[34] In deciding that 'any party' may apply to the High Court to set aside an adjudication determination, the High Court of Singapore, in *Quanta Industries Pte Ltd v Strategies Construction Pte Ltd* [2015] 2 SLR 70 at para 19 held that:

> As it turned out, this facet of the dispute is now moot as the Court of Appeal has held in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ('*Citiwall*'), a judgment that was handed down on 27 November 2014 *after* I heard the parties, that a court exercises its supervisory jurisdiction in hearing and determining an application to set aside an adjudication determination (*Citiwall* at para 41)). *It is unthinkable that this jurisdiction is only exercisable when the respondent makes the application, and in any event, it is plain from s 27(5) that 'any party to an adjudication' may apply to set aside an adjudication determination*. (Emphasis added.)

[35] Western Australia, for instance, in s 46(1) of the Construction Contracts Act 2004 adopts the similar wording of 'aggrieved' as follows:

> *46 Review, limited right of*
>
> (1) *A person who is aggrieved by a decision* made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision. (Emphasis added.)

[36] In fact the Supreme Court of Western Australia, in holding that a 'respondent' could also be aggrieved by an adjudication decision that dismissed the claimant's application, held in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 at para 82 as follows:

> The appellant submitted that because s 46(1) begins with the words '[a] person who is aggrieved' and not 'the applicant', s 46(1) should be taken to apply both to decisions 'to dismiss' and decisions 'not to dismiss'. Implicit in that submission is the proposition that a respondent to an adjudication application could only be aggrieved where the adjudicator does not dismiss the application and, therefore, because the words of s 46(1) do not limit applications for review to the applicant, it should be construed as affording a right of review to the Tribunal where an adjudicator does not dismiss an application and proceeds to make a determination. I do not accept that submission. *There is no reason why a respondent to an adjudication application could not be aggrieved by a decision to dismiss the application*. One example would be where the respondent is of the view, contrary to the applicant's assertions, that it in fact owes no money and is desirous of having an early determination made to that effect. (Emphasis added.)

[37] The word 'aggrieved' is used in s 428 of our National Land Code as follows:

> *Appeals to the Court*
>
> (1) Any person or body *aggrieved* by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court. (Emphasis added.)

[38] The High Court in *Ambank (M) Bhd v Pentadbir Tanah Gombak* [2012] MLJU 1124; [2013] 10 CLJ 87 at para 11 commenting on the locus of the applicant as 'an aggrieved person' held that the words are not confined to only registered owners and that the applicant was competent to make the appeal.

[39] In the context of s 103E of the Legal Profession Act 1976, the Federal Court in *Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor* [2008] 4 MLJ 1 (FC) at para 11 had observed that:

> The position in England has now changed. As Drost J observed in *College of Dental Surgeons v Findlay* [2000] BCTC Lexis 1574:
>
> > However, the law of England has changed since then. *That narrow interpretation of a 'person aggrieved' is no longer accepted*. The tide began to turn with the judgment of Lord Denning in *Attorney General of the Gambia v N'Jie* [1961] 2 All ER 504, where, at p 511, he said: *The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation.* They do not include, of course, a mere busy body who is interfering in things which do not concern him; *but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests*. (Emphasis added.)

[40] Similarly, in *IEV International Pty Ltd v Sadacharamani a/l Govindasamy* [2008] 2 MLJ 754 (HC) in the context of the Patents Act 1983, Ramly Ali J (now FCJ) held that:

> [18] Under s 56(1) of the Patents Act 1983 only 'an aggrieved person' may initiate proceedings against the owner of the patent for invalidation order. *The words 'person aggrieved' has no special and technical meaning and should be liberally construed*. The expression includes anyone who would be or in respect of whom there was a reasonable possibility of his being disadvantaged in a legal or practical sense by the Register being uncertified. (Emphasis added.)

[41] *KJ Aiyer's Judicial Dictionary* (LexisNexis, 14th Ed, 2007), pp 55–56, has this light to shed on the meaning of the term 'aggrieved person' as follows:

> *The words 'aggrieved person' should not be given a very restricted meaning as including only those against who a decision has been pronounced*, which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something. The expression 'aggrieved' includes a person who has suffered a legal grievance (*Abdul Rahim v State* (1978) LW (Cr) 195, p 198 (Mad)). (Emphasis added.)

[42] The Supreme Court of India in *Ayaaubkhan Noorkhan Pathan v State of Maharashtra and Others* [2012] 8 MLJ 679; [2012] 8 Mad LJ 679 (SC), para 10, citing its previous decision, held that the expression 'aggrieved person' *should not be confined within the bounds of a rigid definition*:

In *A Subhash Babu v State of AP & Anr* AIR 2011 SC 3031; (2011) 4 MLJ (Crl) 88, this court held:

> *The expression 'aggrieved person' denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition*. Its scope and meaning depends on diverse, variable factors such as the *content and intent of the statute* of which contravention is alleged, the *specific circumstances* of the case, the nature and extent of complainant's interest and the nature and the extent of the *prejudice or injury suffered by the complainant*. (Emphasis added.)

[43] One can also surmise that 'an aggrieved party' should not be confined to the party in whose favor an adjudication decision is given when one considers that the rationale of s 15 of the CIPAA was to address any *procedural breaches* which might has caused injustice to any party. Surely it cannot be the intention of Parliament that an adjudication decision is immune from judicial scrutiny as long as the adjudicator awards some amount, be it nominal or otherwise, to the unpaid party.

[44] An order given in breach of rules of natural justice is null and void. In *National Union of Bank Employees v Director General of Trade Unions & Anor* [2015] 1 MLJ 881 (CA) para 17, the Court of Appeal noted that:

> Common sense and rule of natural justice will dictate that the views of the appellants ought to have been heard before deciding to register. Failure to strictly comply with the statutory obligations set-out in the section will make the *decision or decision making process a nullity ab initio* without the need even to consider the concept and parameters of judicial review. (Emphasis added.)

[45] I agree with the claimant that if an order or decision is a nullity, it is devoid of any effect and will not bind the parties. In *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 (FC) at p 39, it was held that:

> In the circumstances it is abundantly clear that the second order on which the respondent relies is *no order at all* within and for the purposes of section 263 and is a *nullity and devoid of any effect*. (Emphasis added.)

[46] What would be the effect of a successful setting aside of an adjudication decision? All parties will be restored to their original positions as though the earlier adjudication did not take place. This would entitle the unpaid party to commence fresh adjudication proceedings on the payment claim which decision has been set aside. I agree with learned counsel for the claimant that there is no basis to hold that once an adjudication decision is set aside on any of the grounds under s 15 of the CIPAA, a party is barred from subsequently initiating a fresh adjudication proceeding and that the only recourse would be to arbitrate or litigate the dispute. See the case of *Westwood Structural Services Ltd v Blyth Wood Park Management Company Ltd* [2008] EWHC 3138 (TCC)

where several adjudication proceedings were brought by the claimant in respect of the same subject matter.

WHETHER THE CLAIMANT'S APPLICATION SHOULD BE STRUCK OUT

[47] The application by the respondent to strike out the claimant's OS was brought under O 18 r 19(1)(b) and (d) of the ROC, which is reproduced below:

> 19(1) Striking out pleadings and endorsements (O 18 r 19)
>
> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) ...
>
> (b) *it is scandalous, frivolous or vexatious;*
>
> (c) ... or
>
> (d) *it is otherwise an abuse of the process of the Court,*
>
> and may order the action to be stayed or dismissed orp judgment to be entered accordingly, as the case may be ... (Emphasis added.)

[48] The tests for striking out are as laid down by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 are that:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '*obviously unsustainable*';

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

[49] The recent Federal Court case of *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1 (FC) at para 28 held as follows:

A [28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that *the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie, the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail.* ... (Emphasis added.)

B

[50] The defendant submitted that the plaintiff, is not an aggrieved party as the adjudicator had adjudged a total sum of RM37,629.32 in favour of the plaintiff. The defendant further argued that there is no bona fide basis to set aside the adjudication decision pursuant to s 15 of the CIPAA as the defendant C is not enforcing the adjudication decision in court, and further that the plaintiff as claimant did not suffer any temporary detriment or worse off position in having to make any interim payment under the adjudication proceedings. In fact the defendant had paid the plaintiff in full through a cheque on 22 September 2016.

D

[51] The defendant tried to persuade the court that encl 1 is clearly unsustainable and ought to be struck out.

E **[52]** With respect to learned counsel for the defendant, to hold that the plaintiff/claimant is not an aggrieved party because a certain sum had been adjudged in its favour when it had claimed for a higher sum in its payment claim, would be to tell the claimant that irrespective of the valid grounds for setting aside the adjudication decision, it would have to wait for arbitration or F litigation to be concluded arising out of the same issues raised in the adjudication. That would be render the four grounds under s 15 of the CIPAA inoperative even if it can be shown that those grounds are applicable and can be proved or shown.

G **[53]** Thus if the adjudicator had wrongly declined jurisdiction for one head of claim and dismissed it altogether when indeed he has jurisdiction, the claimant would end up having a lesser sum adjudged in his favour because the adjudicator in breach of natural justice had not heard the claimant's claim.

H **[54]** In such a circumstance I see no good reason why the claimant could not be said to be an 'aggrieved party' in that he had been awarded a lesser sum compared to a bigger sum had jurisdiction been rightly exercise.

[55] Likewise if the adjudicator had allowed the defence of set off for I defective works to be deducted from the claimant's payment claim when it was not raised in the payment response and so the adjudicator had no jurisdiction to consider the defence of set off. Having exceeded his jurisdiction in deducting defective works claim from the claimant's payment claim, the claimant ended up with a much lesser sum than the amount claimed. Again in such a situation

the claimant should be able to set aside the adjudication decision for the lesser sum on ground of excess of jurisdiction.

[56] Learned counsel for the defendant highlighted the dicta in *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] MLJU 941; [2015] 8 CLJ 728 (HC) of Justice Ravinthran Paramaguru J at para [10] where it was held as follows:

> ... *under CIPAA, there is no right of appeal against the decision of the adjudicator which is interim in nature or of temporary finality only*. ... Since an application under s 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits. (Emphasis added.)

[57] I am mindful that in deciding on the issue of locus of the party to apply to set aside an adjudication decision under s 15, I do not and have not ventured into the prohibited province of considering the merits of the case. I merely have to deal with the issue of assuming for a moment that grounds (b) and (d) of s 15 of the CIPAA are applicable, would the party applying to set aside the adjudication decision have locus.

[58] Learned counsel for the defendant argued with considerable persuasion that at the end of the day, what the plaintiff as claimant was dissatisfied with was actually with the quantum of the claim.

[59] It is different if the quantum is the result of the adjudicator arriving at the assessment on account of accepting some evidence and rejecting some evidence. For the court to disturb that would be to interfere with the merits. However, as here, the issue is not arising from evidence and weight to be attached to it but purely grounds falling under a breach of natural justice and excess of jurisdiction which are purely procedural as in how the decision is arrived at rather than the merits of the decision and the other being jurisdictional issue.

[60] Whether or not those grounds are meritorious is best considered not in a striking out application taken out by the defendant but in the plaintiff's OS for setting aside the adjudication decision.

[61] It would have been different if the plaintiff as claimant lacks locus altogether as an 'aggrieved party' in which instance the OS would have to be struck out in limine without even the need to consider whether the grounds of denial of natural justice and excess of jurisdiction are validly grounds raised.

[62] I would therefore dismiss the defendant's application in encl 7 to strike out the plaintiff's OS to set aside the adjudication decision.

[63] I shall proceed to consider whether there are merits in the denial of natural justice and excess of jurisdiction grounds under s 15(b) and (d) of the CIPAA respectively.

WHETHER THERE WAS A DENIAL OF NATURAL JUSTICE WHEN THE ADJUDICATOR APPEARED NOT TO HAVE DECIDED ON THE CLAIMANT'S APPLICATION FOR DISCOVERY

[64] The adjudicator initiated two approaches as set out in para 60 of his decision with respect to deciding the dispute before him. They are as follows:

(a) facilitating a joint re-measurement of the final quantities by qualified personnel from both sides based on endorsed drawings from the project consultants ('the joint re-measurement exercise'); and

(b) seeking clarifications and additional documents from the parties ('the clarification exercise').

[65] In respect of the clarification exercise, the adjudicator requested, amongst others, for the defendant to provide the following documents:

(a) the conditions of contract ('the COC') between the defendant and TTSB (the employer of the defendant);

(b) the final bill of quantities ('final BQ') for painting works used in the approved final claim certificates as certified by the consultant quantity surveyor, architect and/or contractor administrator between the defendant and TTSB;

(c) the certificate of completion ('CPC') issued by TTSB to the defendant for the project; and

(d) the certificate of making good defects ('CMGD') issued by TTSB to the defendant for the project.

[66] In the meantime on 18 August 2016, the parties together with their nominated representatives attended the adjudicator's office to carry out the joint re-measurement exercise as directed by the adjudicator.

[67] However the plaintiff did not send a competent representative to carry out the joint re-measurement. The adjudicator wrote to the solicitors for both the parties on 18 August 2016 as follows:

> During the meeting, Mr Jonathan Kok, the representative from the claimant has stated that the persons representing the claimant at the meeting today (18 August 2016) for the joint re-measurement of the Final Quantities do not have the the adequate competence to perform the joint re-measurement exercise and *do not wish*

to continue with the exercise. Therefore the Joint Re-Measurement exercise could not be carried out. (Emphasis added.)

[68] At para 72 of the decision the adjudicator put on record as follows:

> On 18 August record that the joint re-2016, I ... put in measurement was not able to be carried out because the representatives from the claimant present at the joint re measurement do not (have) adequate competence to perform the joint re-measurement. The nominated qualified person from the claimant vide letter dated 5 August 2016 was not present at the meeting.

[69] On 25 August 2016 the plaintiff made a formal application for discovery of the documents and all instructions issued by the main project's quantity surveyor and/or architect in relation to painting works for the project pursuant to s 25 of the CIPAA ('the discovery application').

[70] The reasons for the discovery application are found in the plaintiff's solicitors' letter dated 25 August 2016 and it stated that the final BQ prepared, approved and certified by the project consultants will show the actual quantities of the works including the painting works performed by the plaintiff.

[71] The defendant replied to the discovery application via its solicitors' letter dated 28 August 2016 and disputed the relevancy of the documents. The plaintiff contended that while the discovery application was still pending, the learned adjudicator on 28 August 2016, informed all parties to cease all communications with the adjudicator on the basis that the decision will be delivered before 8 September 2016 as the re-measurement exercise could not be carried out. Subsequently, the adjudicator delivered the adjudication decision on 6 September 2016.

[72] Learned counsel for the plaintiff argued that the adjudicator had failed to allow the plaintiff an opportunity to be heard on its discovery application. He further argued that by failing to consider the discovery application, the adjudicator had deprived the plaintiff the right to present and prosecute its claim in a fair manner. The plaintiff said that the adjudicator did not decide on the discovery application before he delivered the decision.

[73] To be fair to the adjudicator he had stated at para 82 of his decision that the defendant had furnished the CPC and the CMGD. He had also noted the reasons given by the defendant (who is the respondent in the adjudication) for not furnishing a copy of the main contract COC and the approved final quantities in their award with their employer, Transmission Technology Sdn Bhd ('TTSB') ('the documents') at para 83 as follows:

A

> ... the respondent denied that there is no (sic) such document for approved Final Quantities in their award with their Employer Transmission Technology Sdn Bhd (TTSB). The respondent as a subcontractor to TTSB is not privy to the Conditions of Contract and approved final quantities between TTSB and the Employer. The respondent also reiterated that these documents are irrelevant to the disputes.

B

[74] On 15 August 2016, the adjudicator made an order for specific discovery for the production of the above documents as noted by him at para 84 of his decision.

C

[75] At para 85 the adjudicator further noted:

> ... The respondent reiterates their position that these documents are irrelevant to the adjudication proceedings and the arrangement between the respondent and TTSB is mutually exclusive from the one between the respondent and the claimant. In light of this argument, the respondent is not agreeable to provide these documents.

D

[76] The defendant had submitted in the adjudication proceedings that there was no such document for approved final quantities in the letter of award between TTSB and the defendant. The documents adduced by the parties, namely provisional bill of quantities, site instructions, drawings and calculation and measurement details were sufficient for the adjudicator to make a decision because the claimant's entitlement to payment, if any, which was denied, was to be determined under a re-measurement of the actual works executed pursuant to cl 3.2 of the contract.

E

F

[77] The defendant had also brought to the attention of the adjudicator that the discovery of the conditions of contract of the main contract between the defendant and TTSB, all architect's instructions in relation to the alleged omission and the works, all certificates for payment, final accounts, claims and supporting documents between the defendant and TTSB are not necessary and wholly inappropriate for the purpose of the adjudication proceedings. This is because the claimant had never disputed all the previous certificates certified by the defendant nor have the parties disputed the specifications of work done. The defendant said they had never raised any alleged omission of the works.

G

H

[78] At para 105 of the decision, the adjudicator ruled that:

> *I also used the powers vested in me under the Section 25(b) of CIPAA 2012* to obtain the approved final quantities in the Main Contract between the Main Contractor and his Employer (known as TTSB) *which may assist in this adjudication process*. The respondent has refused to furnish these documents as their claim these documents are irrelevant to the adjudication proceedings as the arrangement between the respondent and TTSB is mutually exclusive from the one between the respondent and the claimant. *As per clause 9 of the Subcontract Agreement, the Subcontractor shall*

I

have access to the Main Contract document except for the details of the prices. (Emphasis added.)

[79] However the non-production of the documents did not in any way hamper the adjudicator from deciding on the dispute based on the documents and evidence before him. It was of course open to him to draw the necessary adverse inferences against the defendant if he was not satisfied with the reasons given by the defendant for the non- production of the documents.

[80] Whilst it would be ideal and indeed, good practice, to set out clearly his decision on the discovery application by the plaintiff, I am of the considered view that the adjudicator had accepted the reasons given by the defendant and that in the rush to get out the decision on time, he could have missed out altogether this matter as in setting out his reasons for dismissing the formal discovery application.

[81] I said that because had he made the order following the discovery application he would have given a time frame for the defendant to comply with it and it has to be before the deadline for the decision to be made on 8 September 2016. In all probability he would have dismissed the discovery application as he had no difficulty arriving at his decision though he might have initially thought that the documents were relevant. From reading para 104 of his decision, it may be safely said that the adjudicator is deemed to have dismissed the discovery application as being unnecessary and irrelevant for the purpose of his decision. It reads as follows:

104 The claimant has also claimed that the respondent also unreasonably denied and/or refused the claimant's request and its contractual entitlement to peruse the Architect's Instructions (if any) issued to the respondent to support its unilateral re-measurement of the works and also to peruse any instructions to that effect including any re-measurement of the Contract Bill of Quantities by the independent Consultant Quantity Surveyor. *Based on the Subcontract Agreement, there is no provision for this in the Subcontract to support the claimant argument*. (Emphasis added.)

[82] What is more important is that the adjudicator, after setting out the reasons operating in his mind with respect to the discovery application, had no difficulty deciding on the dispute without reference to the documents prayed for by the plaintiff/claimant as can be seen at para 106 below:

106 Notwithstanding the above, the claimant is not entitled for his full claim based on the following reasons:

1. The second and main issue of the claimant is fully linked to the dispute in the final quantities for both the Original Contract and Variation Works between the parties.

2. It is clearly stated in the Subcontract Agreement that the final quantities shall be based on measurement of the actual works done.

3. The claimant is fully aware that this re-measurable Subcontract and he has not taken any initiative on his own to carry out re-measurement of the final quantities to submit his final claim.

4. The claimant was furnished with the final quantities by the respondent and he has not disputed these quantities based on measurement.

5. The claimant has also refused to the request by the respondent to carry out a joint re-measurement of the quantities.

6. The claimant has also not taken the initiative to participate in the joint re-measurement exercise arranged by me to resolve the final quantity quantum.

[83] I would ask myself the reverse question which is, assuming that the adjudicator had wrongly dismissed the discovery application, would this court interfere in that decision? I do not think so. I should restrain myself from interfering with the decision made by an adjudicator in interlocutory applications made before him or in the way he conducts the adjudication proceedings by utilising the powers available to him under s 25 of the CIPAA unless the way he went about it is manifestly unfair and a material breach of natural justice or that he had exceeded his jurisdiction in the result.

[84] Here the adjudicator had considered the reasons given by the claimant for the discovery application and the objection taken by the respondent to the said application. Even if he had made a wrong decision on the application, this court would not interfere for it is only a step towards arriving at his decision. If his decision cannot be interfered with except for the narrow grounds set out in s 15 of the CIPAA, none of which goes towards the merits of the case as it is not an appeal, then a fortiori, I would not interfere with his decision made on an application before him.

[85] In as much as I cannot review the adjudication decision on merits, I would also not review the adjudicator's decision on an interlocutory application on its merits.

[86] Generally the court would not interfere with a decision made in an interlocutory application as that has to do with the exercise of discretion on the part of the adjudicator in deciding within his vast powers under s 25 with respect to the way the adjudication proceedings should be conducted. The court would confine itself to the ultimate decision made and see if it is susceptible to setting aside for the grounds set out in s 15 of the CIPAA for otherwise a decision of interim finality would be saddled with as many

interlocutory applications as lawyers assisting the parties may think of, unnecessarily stretching the adjudication process to beyond the strict statutory period to deliver the decision.

[87] What was designed to be a speedy and simple process should not be converted into a cumbersome and convoluted one akin to full-blown litigation proceedings adrift with applications.

[88] Learned counsel for the plaintiff suggested that the adjudicator ought to have requested additional time from parties to enable him to consider the discovery application. This he said can be seen from the judgment of Humphrey Lloyd QC in *Balfour Beatty Construction Ltd v Lambeth London Borough Council* [2002] EWHC 597 (TCC), at para [35]:

> [35] An adjudicator, acting impartially and in accordance with the principles of natural justice, ought in such circumstances to inform the parties that *a decision could not properly reasonably and fairly be arrived at within the time and invite the parties to agree further time. If the parties were not able to agree more time then an adjudicator ought not to make a decision at all and should resign*. (Emphasis added.)

[89] It must be borne in mind that an adjudicator has to deliver his decision within the strict time frame provided for in s 12(2)(a) of the CIPAA which in this case is within 45 working days from the service of the adjudication reply.

[90] The plaintiff as claimant only made a formal application for discovery of documents at the eleventh hour, especially after it had refused to carry out a joint re-measurement exercise and approximately ten days before the adjudicator was statutorily obliged to deliver his adjudication decision.

[91] At any rate, at that stage of intense contestation it does not appear to be a matter where parties would mutually agree to extend time under s 12(2)(c) of the CIPAA for the adjudicator to deliver his decision.

[92] I understand that the other alternative would be for the adjudicator to resign but I do not think that he should after having heard the parties for so long unless it is a matter that he would not be able to decide without the documents prayed for. As it turned out, he could decide and he did decide for the reasons given by him. Any attempt to vary the sum adjudged by him would descend into the merits of the claim which this court must resist as this is not an appeal.

[93] There is yet another option open to the adjudicator which is to draw the necessary adverse inference against the defendant but apparently he did not go down that route for the reasons given for his decision at para 106 of his decision set out above.

[94] A further reason why no adverse inference was drawn against the defendant can be surmised from para 103 of his decision as follows:

> The argument by the claimant that the Final Quantity measurement by the respondent is unilateral, without any basis and without any substantiation cannot be accepted because the claimant has been furnished with the quantities measured by the respondent and forwarded to them on 27 January 2014. The full take-off sheets of the quantities have also been furnished in the adjudication Response (Annexure 1 to 3 of RBD). The claimant has also not requested for the full details of the measurement from the respondent after receiving the final quantities on 27 January 2014. From the furnished evidence, the respondent has given ample opportunities to the claimant to verify the re-measured quantities and the claimant has not used it.

[95] It is not every breach of or denial of natural justice in an adjudication case that will result in the decision being set aside. The breach must be material and not minor, it must be patent and not peripheral. Such was the approach affirmed in *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) at para 57 as follows:

> [57] From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:
>
> (a) it must first be established that the adjudicator failed to apply the rules of natural justice;
>
> (b) any breach of the rules must be more than peripheral; *they must be material breaches*;
>
> (c) breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;
>
> (d) whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves *a question of degree which must be assessed by any judge in a case such as this*;
>
> (e) *it is only if the adjudicator goes off on a frolic of his own*, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or,
>
> (f) where relevant put in further evidence, that the type of breach of the rules of natural justice with which *the case of the Balfour Beatty Construction case*

was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto. (Emphasis added.)

[96] In *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 (HC), SEF Construction Pte Ltd applied to set aside the adjudication application on the ground that the adjudicator had breached the rules of natural justice by failing to consider SEF's submissions on two out of the four jurisdictional issues. Judith Prakash J (now JA) at paras 58–59 held that:

> [58] Having given this question somewhat anxious consideration since affording natural justice is a fundamental requirement of the adjudication procedure, *I have decided that the adjudicator's failure to discuss the submissions in his adjudication determination was not a breach of natural justice*. In coming to this conclusion I was fortified by the views of Dyson J and the AR quoted above (at pp 51–52). I also found useful and practical guidance from the Australian cases, notwithstanding their references to good faith which is a concept that I have found not to be applicable in Singapore. ...
>
> The following passage of the judgment of Palmer J in *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1 was particularly useful:
>
> > 57 Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 22(2)(c) and (d). *Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties.*
> >
> > 58 In some cases, it may be possible to say that the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination. In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties. *If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result. Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination. The Court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons: the Court should not be too ready to infer lack of good faith from the adjudicator's omission to deal with an issue when error alone is a possible explanation.* (Emphasis added.)

[97] Whatever may be the reason for the adjudicator's omission to state

A categorically his decision on the discovery application, there was no breach of natural justice. Natural justice requires that the parties should be heard; it does not require that they be given responses and determinations on all submissions made. See the case of *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260.

B

WHETHER THE ADJUDICATOR HAD ACTED IN EXCESS OF HIS JURISDICTION WHEN HE DECIDED ON A LESSER SUM ADMITTED BY THE DEFENDANT AS THE NON-PAYING PARTY WHEN THE DEFENDANT HAD EARLIER IN THEIR PAYMENT

C RESPONSE HAD CROSS-CLAIMED FOR OVERPAYMENT

[98] It is trite that the jurisdiction of the adjudicator is confined to the matters contained in the payment claim and payment response. This can be

D seen from s 27(1) of the CIPAA:

> 27 Jurisdiction of Adjudicator
>
> Subject to subsection (2), *the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6*. (Emphasis added.)

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[99] In *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* [2015] MLJU 695, at para 66, Mary Lim J (now JCA) held that:

> [66] With respect, the court finds these concerns misplaced. *It may be said that by virtue of subsection 27(1), the payment claim and the payment response is to adjudication what pleadings are to civil litigation.* Parties are bound by their pleadings under the rules of procedure in civil litigation; *in adjudication, those pleadings are to be found in the payment claim and the payment response; and not in the adjudication claim, adjudication response or the adjudication reply.* (Emphasis added.)

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[100] The above decision has been affirmed by the Court of Appeal in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2016] 6 MLJ 717.

H

[101] Learned counsel for the plaintiff submitted that based on the established legal principles, the matters and documents that were not referred to in the payment response must not be considered by the adjudicator. He then referred to paras 107–108 of the decision where the adjudicator made specific reference to the revised certificates that were not referred to in the payment

I response and accepted the amount therein. He urged the court to conclude that in view of the above, the adjudicator had clearly acted in excess of his jurisdiction.

[102] In the payment response filed the defendant as the respondent in the adjudication had denied owing the amount claimed by the plaintiff/claimant and had in fact cross-claimed the amount of RM16,740.71 being overpayment to the claimant.

[103] In the adjudication response filed by the defendant, the defendant abandoned the cross-claim and admitted that upon a proper calculation under a re-measurement of the actual works executed pursuant to the express provision of cl 3.2 of the contract there is a sum of RM29,791.73 due and payable to the plaintiff after a review of the quantities of works done. The defendant admitted there was an inadvertent mistake in the certificate of payment No 11 where an additional sum of RM13,504.41 for variation orders Nos 2(R), 5, 6 and 7 were omitted by them.

[104] This payment took into account the balance of payment for certificate of payment No 10, certificate of payment No 11 (revised) and certificate of payment No 12 as explained in Part D of the adjudication response. Since the original contract sum had been revised to RM936,167.81 after the re-measurement, the defendant did not need to make any further payment to the plaintiff/claimant, except for the sum of RM29,791.73.

[105] There is nothing improper in abandoning a cross-claim made in a payment response. The payment response had nevertheless denied the amount owing to the plaintiff as claimant. There is equally nothing improper in now conceding at the adjudication response stage that the amount owing is for a lesser sum than what the claimant has claimed. The defendant admitted to a sum of RM29,791.23 owing to the plaintiff as claimant.

[106] It is within the jurisdiction of the adjudicator, in the light of the concession and admission made, to then ascertain what is the actual amount owing to the plaintiff/claimant by the defendant/respondent. The adjudicator had not transgressed outside the payment claim and the payment response because the adjudicator rightly understood his jurisdiction to determine the amount owing to the claimant for the construction work done.

[107] The rules of pleading must not be made more stringent in adjudication than in litigation. If in a court of law, a defendant is allowed to make concession and admission at the trial when in its defence it had denied the whole sum claimed and even put in a counterclaim, I see no good reason why in an adjudication the same concession and admission cannot be made by the respondent non-paying party and even to abandon its cross-claim altogether.

[108] The adjudicator would still have to decide based on the evidence adduced, as to whether the claimant is entitled to the whole of its claim and if

not, how much of the claim as may have been proven. In this case, the adjudicator was satisfied, for the reasons given, that the amount owing is as admitted by the defendant from the re-measurement done and the revised certificate and the final certificate issued.

[109] Whilst it is true that the defendant had revised its certificate of payment No 11 and had also issued its final certificate of payment No 12 for the release of the second moiety retention sum on 23 June 2016 yielding a sum of RM29,791.23 owing to the claimant, the adjudicator is not obliged to accept this sum *ipso facto* or unquestioningly.

[110] The adjudicator is entitled to look at the fresh concession and admission and see whether the payment claim is nevertheless supported by the evidence before him. He has vast powers under s 25(m) to review and revise any certificate issued or to be issued and any valuation of the parties. In other words, even if the defendant had not made those concession and admission, the adjudicator is entitled to exercise his vast powers under s 25(m) and (n) of the CIPAA to review and revise any certificate issued or *to be issued* and any valuation arising out of the re-measurement exercise suggested by him as the factual matrix of the dispute may demand. Section 25(m) and (n) of the CIPAA provide that:

> 25 The adjudicator shall have the powers to —
>
> (m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;
>
> (n) decide or declare on any matter notwithstanding no certificate had been issued in respect of the matter;

[111] The adjudicator had evaluated the evidence as set out at paras 99, 103 and 107–108 of the adjudication decision as follows:

> [99] The respondent has instructed the claimant to carry out Additional Works which is not part of the Contract scope through variation orders and/or site instructions. This was not disputed by the respondent ... The claimant has also confirmed vide his letter dated 12 August 2016 on the clarification from me. ... the claimant has estimated the value to be RM169,349.17 in his final progress claim and the respondent has valued this in the Final Certificate of Payment of No. 12 as RM166,145 March This difference can be verified in the final re-measurement between the parties. The claimant has also confirmed through the clarifications that the difference of RM3,204.14 is only related to quantity dispute. This can also be verified in the final re-measurement of the quantities.
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> ...
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> [103] ... The argument by the claimant that the Final Quantity measurement by the respondent is unilateral, without any basis and without any substantiation cannot

be accepted because the claimant has been furnished with the quantities measured by the respondent and forwarded to them on 27 January 2014. The full take-off sheet of the quantities have also been furnished in the adjudication Response ... The claimant has also not requested for the full details of the measurement from the respondent after receiving the final quantities on 27 January 2014. From the furnished evidence, the respondent has given ample opportunities to the claimant to verify the re-measurement quantities and the claimant has not used it.

...

[107] Respondent has carry out the final measurement of the quantities and furnished the full details of the take-off as attached in Adjudication Response (Annexure 1 to 5 of RBD).

[108] *In absence of any valid objection by the claimant on the proposed final quantities by the respondent, I have to consider that the respondent Final Quantities produced in the Certificate of Payment No 11 (Revised) represent the actual final quantities under the present condition*. (Emphasis added.)

[112] At this juncture, it must not be forgotten and indeed one must always remember that the above are findings of facts made by the adjudicator based on the evidence tendered. The findings of facts by an adjudicator does not warrant the intervention of this court in setting aside the adjudication award as the adjudicator had addressed all the right issues before him.

[113] It cannot be over-emphasised that it is not for this court to re-hear, re-open or re-evaluate the findings of fact made by the adjudicator in this setting aside application. Any invitation to go down that road under the guise of excess of jurisdiction must be resisted.

[114] Admittedly the plaintiff is not satisfied with the amount adjudged for he had expected to be awarded the whole of his claim. Where quantum is concerned, he would have to correct it in arbitration or litigation lest this application be turned into an appeal.

[115] The adjudicator found nothing mala fide in the defendant's certificate No 11 (revised) being a valuation of additional works according to the re-measurement rules under the contract. I agree with the defendant that the revision in the amount of the plaintiff/claimant's certificate No 11 (revised) does not change the basis of its defence that the claimant's entitlement to payment is to be determined under a re-measurement of the actual works executed pursuant to cl 3.2 of the contract.

[116] The adjudicator has the jurisdiction to deal with an adjusted quantum of cross-claim and more so when the net result is a positive sum owing to the claimant. The decision of the English High Court in *Working Environments Ltd v Greencoat Construction Ltd* [2012] 142 ConLR 149 is illustrative of this as

follows:

> [30] The ambit of the dispute included at the very least the first nine quantified items within the withheld items referred to in the 2 December 2011 certificate. The fact that they were re-quantified, in part, by Tabs 2 and 6 did not, in my judgement, take them out of the ambit of the referred dispute. *It must be open to the parties within reason to adjust the quantum of disputed items; it would be extraordinary for instance if a claiming or defending party could not, jurisdictionally, reduce its claim or cross-claim within a referred dispute.* The extent to which a party could increase such a claim or cross-claim after the dispute has been referred would be a matter of degree and reason; for instance, if it was so increased such that it was no longer the same claim, it may well be that the adjudicator would have no jurisdiction to deal with the increased claim. ... (Emphasis added.)

[117] In *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* case, Ravinthran Paramaguru J found as follows:

> [87] ... In fact, *s 25(n) of the CIPAA* states that the adjudicator has power to 'decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter'. Under *s 25(m),* the adjudicator is also empowered to 'review and revise any certificate issued or to be issued'. *This simply means, even if the contractual agreement between the parties provides for issuance of a certified interim or progress claim, the absence of certification cannot deprive the unpaid party from availing the adjudication process.* Furthermore, in the instant case, the adjudicator, in para 80 of his decision, invoked his power to 'review and revise' under *s 25(m)* to assess the work done by the respondent. *He is entitled to do so although no certificate was issued by the applicant as s 25(m) covers cases where a certificate 'is to be issued' or in other words covers cases where no certificate was actually issued.* (Emphasis added.)

[118] In *Bina Puri Construction Sdn Bhd* case, Ravinthran Paramaguru J had further observed astutely that:

> [14] As I said earlier s 15 does not envisage that the decision of the adjudication can be reviewed on its merits. Therefore, it is immaterial if the adjudicator had erred in his finding of facts. The decision of an adjudicator is only of temporary finality pending final settlement of accounts. In the premises, unless that there is a clear cut breach of natural justice or excess of jurisdiction, the court should be slow to set aside the decision of the adjudicator. This approach has been adopted in England where the adjudication process was introduced much earlier. In oft-cited *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, Chadwick LJ said as follows:
>
> > The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to recognise that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors ... *The need to have the 'right' answer has been subordinated to the need to have an answer quickly* ... (Emphasis added.)

[119] In the case of *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC) Fraser J held as follows:

> 12. *It is trite law that adjudication is a speedy process designed only to provide what is called 'interim finality' on construction disputes. Parliament intended that the parties should be given a quick answer, and that quick answer should be binding on the parties until the dispute, whatever it may be, is resolved finally either by litigation or arbitration* ... Adjudicators' decisions will be enforced by the court by summary judgment regardless of errors of fact and/or law by the adjudicator. Aggrieved losing parties can and should comply with the adjudicator's decision, as long as that decision was made by an adjudicator with jurisdiction over the dispute, who has conducted the adjudication fairly and in accordance with the rules of natural justice. (Emphasis added.)

[120] An adjudication under the CIPAA merely provides an interim solution which meets the needs of the case. If a party wishes to pursue a claim in court or arbitration proceedings, it is at liberty to do so after the completion of or concurrently with the pursuit of the claim in adjudication proceedings. I cannot do better than to quote the words of Mary Lim J (now JCA) in *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873 in citing *Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778:

> 83. *It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels of 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of the adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case.* Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting legitimate cash-flow requirements of contractors and their subcontractors. *The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions.* Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present. (Emphasis added.)

[121] There is thus no basis for the allegation that the adjudicator had exceeded his jurisdiction in considering the revised Certificate No 11.

A PRONOUNCEMENT

[122] I had therefore dismissed the plaintiff's OS in encl 1 to set aside the adjudication decision. As I had also earlier dismissed the defendant's application in encl 7 to strike out the plaintiff's OS, I exercised my discretion and made no order as to costs.

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Order accordingly.

Reported by Afiq Mohamad Noor

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